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HAROLD B. WILL

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

No. 894.

EDWARD E. MORGAN CO., INC., JONES & GILLIS, INCORPORATED, UNITED STATES FIDELITY AND GUARANTY CO., and STANDARD ACCIDENT INSURANCE COMPANY, *Petitioners,*

vs.

UNITED STATES OF AMERICA, for the Use of W. O. PELPHREY,
Respondent.

PETITION FOR CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

No. .....

EDWARD E. MORGAN CO., INC., JONES & GILLIS, INCORPORATED, UNITED STATES FIDELITY AND GUARANTY CO., and STANDARD ACCIDENT INSURANCE COMPANY, *Petitioners*,

vs.

UNITED STATES OF AMERICA, for the Use of W. O. PELPHREY,
Respondent.

PETITION FOR CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PREFACE.

Come Edward E. Morgan Co., Inc., Jones & Gillis, Incorporated, and their sureties, United States Fidelity and Guaranty Company and Standard Accident Insurance Company, and move the court to grant them leave to file with

and present to this Honorable Court the accompanying petition for a writ of certiorari directed to the United States Court of Appeals for the Fifth Circuit in Cause Number 15,650 on the docket of said court from the adverse judgment of said court affirming the judgment of the lower court (R. 263) on February 23, 1956, and finally denying a petition for rehearing (R. 284) therein on March 23, 1956, as set forth in the accompanying petition for said writ of certiorari; and show unto the court that said petition is meritorious and petitioners should be allowed to file and present the same to prevent a miscarriage of justice in this case.

PETITION FOR CERTIORARI.

The petitioners pray that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Fifth Circuit entered in the case of Edward E. Morgan Co., Inc., et al., Appellants, v. United States of America for the Use of W. O. Pelphrey, Appellee, affirming the judgment of the United States District Court for the Western District of Texas, Waco Division, in said cause adverse to appellants (R. 263).

I.

The majority and dissenting opinion of the lower court is not yet reported, officially or unofficially, but a copy of both opinions appears in the appendix hereto.

II.

This suit arose under the Miller Act, 40 U. S. C. A., Sec. 270 (a) *et seq.* It is a suit by a subcontractor against the prime contractors and their surety on the statutory payment bond given by them in connection with a contract

for the construction of certain runways and facilities for a government air force base near Killeen, Texas. The petitioning contractors as defendants were clearly entitled to a peremptory instruction in the lower court under controlling decisions from the Supreme Court of Texas and from this court. The jury was not sufficiently instructed as to its duty in passing upon the intent and meaning of the phrase "cubic yard" in a letter-contract between the parties prepared by respondent to afford the jury any safe guide in its deliberations. Proper and necessary instructions requested by petitioners were refused by the court. A clear defense of accord and satisfaction was unmistakably established but was ignored by the court. In the interest of uniformity of decisions on important questions of Federal law which should be settled by this court and to prevent a complete departure from accepted and usual course of judicial proceedings, this court should grant a writ of certiorari to prevent a grave miscarriage of justice in this case.

(a) The judgment of the Court of Appeals was rendered and entered on February 23, 1956 (R. 263).

(b) On the 12th day of March, 1956 (within the twenty-one day period provided by Rule 29 of said court), a petition for rehearing was filed in the lower court. A copy thereof appears at Page 264 of the record. Said petition for rehearing was denied on the 23rd day of March, 1956 (R. 284).

(c) The power to review the judgment adverse to the petitioners is conferred by 28 U. S. C. A., Section 1254(1).

III.

The questions presented by this petition for review by this court are:

(1) The refusal of the lower court to give petitioners a peremptory instruction or directed verdict. That instruction should have been granted by the trial court for two reasons:

(a) The respondent produced no proof whatever to show that the parties intended on April 13, 1953, to measure this crushed stone by the cubic yard by loose truck measure. No evidence or inference on any evidence in this record authorized the court to submit that question to the jury or supports the finding of the jury for the respondent. All of the evidence and inferences would lead to the conclusion that if there were a meeting of the minds of these parties on that question that they intended that this crushed stone should be measured by the United States Engineers in place and that these Engineers' estimates under which petitioners were paid should be used as the basis for settlement with respondent except that respondent was to be paid for not less than 40,000 cubic yards (R. 14) although it was probable that the petitioners would not be paid for more than 30,500 cubic yards (R. 123, 179).

(b) The evidence conclusively showed that petitioners issued their check to respondent for $22,374.44 on August 27, 1953, on condition and with notations thereon to the effect that it was in full payment of this controversy in suit (R. 29), and said check was transmitted by letter of like tenor (R. 28). The petitioners refused to delete such notation from said check (R. 119-120); nevertheless, the respondent during the trial voluntarily endorsed said check to the clerk and caused the proceeds thereof to be deposited into the registry of the trial court (R. 120, 150, 210). Such incident was interposed as a defense and settlement of this suit (R. 184, 12, and 13) to no avail.

(2) The lower court refused to grant petitioners proper and sufficient instructions to the jury to enable them to understandingly discharge their duties. Those requests

for additional instructions refused by the trial court and affirmed by the Court of Appeals should have been given if this case were submitted to a jury. Legal rules governing their deliberations were not explained to the jury and the jury was thus allowed to grope in ignorance of such rules to the wholly untenable conclusion which was arbitrarily reached by them in this case.

(3) The trial court erroneously allowed the respondent over petitioners' repeated objections (R. 186, 187, 189, 193, 200) to offer testimony on the question of "custom and usage" in Texas to establish the intent and meaning of the contract in suit after both sides had concluded their testimony and as rebuttal without amending the complaint under the rules (R. 185). Such question of custom and usage thus belatedly injected as an afterthought became the controlling aspect of the case in determining by such devious means what the contracting parties intended by a contract which was made in Jackson, Mississippi, to be performed near Killeen, Texas, Mr. Morgan who accepted the proposal in Jackson (R. 146), said that he intended and the contract meant to measure the cubic yard of this material "in place" and not by loose truck measure (R. 146). Mr. Pelphrey, the other contracting party, never disputed Mr. Morgan's statement or said that the parties intended anything to the contrary on said date. Mr. Pelphrey did not testify on the question of custom and usage but elected to remain mute on that question. If respondent were to have been paid by the cubic yard in place for this material as the prime contractors were paid, as petitioners contend, then, admittedly, they owed him nothing. Long after April 13, 1953, the prime contractors made another contract with a man named Goetz (R. 181) wherein they expressly agreed to pay him for hauling this same material, and they paid Goetz for hauling 9,598 truck-

loads which were treated as containing five cubic yards each (R. 138). Respondent seized upon this fact under this subsequently made contract with a third party to contend that by this hauling contract that these contractors owed him for that same quantity of such material. Significantly, when the contract was made on the 13th day of April, 1953, it was actually contemplated that the material would be hauled in Euclids and not trucks at all. It was contemplated that the respondent might stockpile the material (R. 14-15). It was not until later that it was decided to hire Goetz to haul the material in his trucks (R. 181) and but for this later turn of events, the respondent would have had no evidence to support his claim as this record shows.

(4) The court on this special verdict of the jury awarded respondent a judgment for $30,325.33 with six percent interest thereon after July 24, 1953, to the date of judgment on March 24, 1955 (R. 218), and authorized an application thereto of the $22,374.44 monies in the registry of the court. If anything were due, the award of interest in this Miller Act case is controlled by Federal statute and such award is in contravention thereof under 28 U. S. C. A., Section 1961.

IV.

The respondent sued in this case under 40 U. S. C. A., Section 270(a), *et seq.*, known as the "Miller Act," to recover money allegedly due for crushed stone furnished petitioners who were prime contractors on a public job for the United States. The suit was filed within the statutory time and was based solely upon express terms of a letter-contract between the parties for mining and crushing Edwards limestone at $1.01 per cubic yard (R. 14). The petitioners plead and proved that only 34,030.66 cubic yards

of this crushed stone were furnished by the respondent according to United States Engineers' estimates and actual measurements of the material "in place" by the engineers and according to which measurement the petitioners themselves were paid by the United States (R. 152). The petitioners issued their checks to respondent for 40,000 cubic yards of this material as the minimum quantity fixed in the contract (R. 152). Respondent contended for 47,990 cubic yards and showed that petitioners had paid Goetz for hauling 9,598 truckloads which Goetz and the petitioners treated as containing five cubic yards per load for the purposes of their express contract to establish his (respondent's) claim for furnishing such quantity of said material (R. 138). Admittedly, the parties never had any understanding or agreement, express or implied, about this material other than is contained in the letter-contract (R. 131-132, 181). No agreement about truck measure, no inspection or effort was made to estimate truck measurement of this material for the purposes of the contract in suit, and no supervision of any kind was provided by either party for the loading of the material or to see that the trucks were fully loaded (R. 131-132). There was and is an absolute dearth of evidence or testimony in the record to show or even indicate that these parties ever agreed or intended in any manner that petitioners should pay for this material by "loose truck" measure. The minimum quantity (40,000 cubic yards) of this crushed rock is mentioned in the contract because the parties realized that there was a one-third shrinkage factor in the material in place (R. 132, 180).

When preparing this letter-proposal to the petitioners (R. 14), respondent knew that the United States Engineers in Item Four of their Information to Bidders (R. 65) had estimated that 30,500 cubic yards of this crushed stone would be needed to do this job (R. 123, 179). Respondent

furnished 34,030.66 cubic yards according to United States Engineers' estimates (R. 152) but he was paid by petitioners for 40,000 cubic yards with their said $22,374.22 check (R. 28). The respondent had the entire section of the specifications in hand in submitting his proposal to furnish this crushed rock (R. 71, 126) and these specifications showed that petitioners were to be paid for the material by the engineers' estimates in place (R. 82-83). Nevertheless, not a word was said by respondent to even indicate that he had in mind any other method of measurement of this material by the cubic yard other than "in place." At the conclusion of the petitioners' testimony, for the first time the respondent injected into the case the question of custom and usage in Texas (R. 185) over the petitioners' continuing objection (R. 186, 187, 189, 193, 200). No order was entered by the lower court authorizing the amendment which was subsequently made of the complaint (R. 6). The trial court submitted the case to the jury for a special verdict under Rule 49(a) (R. 215-216). It refused petitioners' request for a directed verdict (R. 213). It refused to give any instructions requested by the petitioners to guide the jury in its deliberations, although the petitioners were clearly and undeniably entitled thereto (R. 211-213). The lower court erroneously entered a judgment against the petitioners and their sureties on their payment bond for $30,325.33, together with six percent interest from July 24, 1953, and provided that the sum of $22,374.44 in the registry of the court as the proceeds from petitioners' check should be applied thereto and deducted from said principal award (R. 218). The United States Court of Appeals for the Fifth Circuit affirmed said judgment and denied a petition for rehearing. The attention of the court is directed to the fact that the petitioners clearly tendered their $22,374.44 check to respondent on condition that it be accepted and cashed in full settlement of this suit (R. 29). The peti-

tioners expressly declined to delete such provisions from their said check as the complaint itself expressly states (R. 119-120, 5), yet the respondent caused said check to be cashed under such circumstances and paid into the registry of the court and thereby effected an accord and satisfaction under all of the authorities.

V.

Jurisdiction was vested in the trial court in this case by 40 U. S. C. A., Section 270(b). It was a suit under this Federal statute against these contractors who constructed runways and other facilities for the United States at one of its very important and strategic air force bases. The questions involved in this case are of extreme importance to these petitioners as contractors and others about the country who are invited to bid competitively for work in Texas for the government. A jury in this case has been permitted to arbitrarily decide the case adversely to these nonresidents of Texas without a scintilla of evidence to support their conclusion. The lower court has failed to apply the rules of the applicable and controlling authorities to this case; and this court should intervene to correct such errors.

VI.

(A) The court erred in refusing to direct a verdict for the petitioners (R. 213) because:

1. There was not a scintilla of testimony to show that these parties intended on April 13, 1953 (R. 15), to measure this crushed stone by loose truck measure. The petitioners owed the respondent nothing if the crushed stone was to be measured by the United States Engineers in place (compacted) as petitioners contend was intended and as the testimony shows was their intent when the contract was made at Jackson, Mississippi. Respondent had Sec-

tion Four of the Specifications which showed how this material was to be measured by the cubic yard in place for payment to the prime contractor (R. 82-83), and he (respondent) had these data for the purpose of making this proposal to petitioners to furnish this material. Under such circumstances it is presumed as a matter of law that both parties intended to so measure this crushed stone or respondent would have otherwise stated in his proposal. Stated differently, in case of ambiguity in respondent's proposal, it should be given that meaning which he knew or had reason to know was in accordance with the understanding of the other party.[1] The authorities are legion to the effect that a plaintiff must produce more than a scintilla of evidence or suffer an adverse judgment.[2] The respondent's proposal itself shows that this material would be delivered to petitioners' hauling units known as Euclids which are not trucks (R. 14) (and not to Goetz' trucks) or it could have been stockpiled. Either of such alternative performances would have divested respondent of data gained from the performance by Goetz of a *subsequently made* hauling contract (R. 181) under which Goetz hauled 9,593 truckloads of this crushed stone under an express contract for which he was paid by petitioners at the rate of five cubic yards per load.

2. There was an accord and satisfaction by respondent voluntarily endorsing and delivering petitioners' $22,374.44 check to the clerk during the trial to cover into the registry of the court. This check was delivered on condition that it be accepted in full payment of the claim in suit. The letter of transmittal (R. 28) and the check itself clearly

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[1]17 C. J. S., Section 295, p. 695.

[2]*Pennsylvania Railroad* v. *Chamberlain,* 288 U. S. 333, 53 S. Ct. 391, 395.

so provided (R. 29). Petitioners refused to delete such inscription from the check as the complaint itself states (R. 5). The cases are myriad to the effect that such use of said check effected a full accord and satisfaction of the claim in suit.[3] That respondent intended to effect such legal result is conclusively presumed by reason of the necessary effect of his deliberate act. Every man is presumed to intend the natural and probable consequences of his own act.[4]

(B) The instructions of the lower court furnished no safe and dependable guide to the jury (R. 215-216) and failed to inform the jury of proper yardsticks for use in considering the case (R. 211-213). The case was submitted for special verdict under Rule 49(a), Civil Procedure. The court erroneously submitted a mixed question of law and fact (intent of the parties and meaning of the contract) in its charge to the jury[5] (R. 215). In the first place, this was clearly not a case for employment of the ill-favored special verdict under this rule. The jury was entitled to more explicit instructions to guide them in an understanding deliberation in the case (R. 212-213). The court should not have admitted any testimony of custom and usage over the petitioners' objections (R. 186, 187, 189, 193, 200). No fixed custom or established usage was proved sufficiently

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[3]*Chandler* v. *State Highway Board*, (5 C. A.) 61 F. 2d 601, 604; *J. Kahn & Co., Inc.*, v. *Clark, Attorney General*, (5 C. A.) 178 F. 2d 111, 114; *Autographic Register Co.* v. *Phillip Hand Co.*, (5 C. A.) 198 F. 2d 212, 213; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Heman Clark*, 178 U. S. 353, 20 S. Ct. 924; *Hemingway, Treas.*, v. *Stansell*, 106 U. S. 399, 1 S. Ct. 473.

[4]*Allen* v. *United States*, 164 U. S. 492, 17 S. Ct. 154, 155; 20 Am. Jur. 227, Section 232; 31 C. J. S. 750, Section 131; A. L. I., Torts, Section 531.

[5]*Kirby H. Jackson et al.* v. *C. E. King*, (5 C. A.) 223 F. 2d 714, 718.

to give rise to any presumption of intent of these parties on the date of the making of this contract.[6] The contract came into being by acceptance in Jackson, Mississippi, and Mr. Morgan who signed it (R. 15-16) said that he never had any notice or knowledge of any such alleged practice in Texas (R. 204). Mr. Pelphrey who sent the proposal to Mr. Morgan never testified but remained mute on that question. The suit, however, was on an express contract (R. 3-4) which was never changed (R. 131-132, 181). This testimony actually added nothing to respondent's case but obviously confused the jury. In the alternative, the court erred in overruling petitioners' motion for a judgment and new trial (R. 221). The respondent has induced the court unwittingly to make a contract for him which he could not have made with petitioners and then has enforced it for him.

The untimely and improper receipt of testimony on custom and usage to effectually amend the contract in suit

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[5]Custom must be plead and clearly proved. *Albert* v. *Farnsworth*, (5 C. C. A.) 176 F. 2d 198.

Usage must be shown so generally that it would be unreasonable to show parties ignorant of it. 55 Am. Jur. 285, Section 25.

Custom to be binding by implication must be so universal as to be conclusively presumed a part of the contract. 55 Am. Jur. 269, Section 7.

Courts look with disfavor on doctrine of custom and usage. Actual knowledge or usage so general that parties presumed to have acted on it must be shown. 20 Am. Jur. 311, Section 333; *Meridian Star* v. *Kay*, 52 So. 2d (Miss.) 35; *Whitfield Transportation Co.* v. *Border Truck Lines*, 271 So. 2d 706, 708. Citing 5 Tex. Jur., pp. 1025-1026, Section 15, and 55 Am. Jur. 283, Sections 21 and 22.

Usage in Texas could not affect contract made in Mississippi. *Insurance Co. of North America* v. *Hibernia Insurance Co. of New Orleans*, 140 U. S. 565, 11 S. Ct. 909, 911.

and the erroneous and inadequate instructions of the court[7] were potent and controlling incidents which resulted prejudicially to the petitioners' hurt and constitute such a departure by the lower court from established precedent as to call for an exercise by this court of its power of review and supervision.

(C) The court in this case has allowed interest on this judgment from a date prior to the date of the judgment in contravention of 28 U. S. C. A., Section 1961. The matter of the allowance of interest in this suit based on a Federal statute is a substantial Federal question and not a local one.

The propriety of this award of interest prior to the date of this judgment in contravention of this statute presents a substantial and important Federal question not previously determined by this court and justifying certiorari in this case.[8]

This Honorable Court should review this case and correct and vacate such unjust decision and rectify such miscarriage of justice. The dissent in this case by a peerless lawyer and erudite scholar of the law alone should convince this Honorable Court that petitioners' case should be reviewed here in the exercise of a sound judicial discretion.

Premises Considered, the petitioners pray that upon a full consideration of this case by this Honorable Court that it may please the court to order the issuance of a writ of certiorari directed to the United States Court of Appeals for the Fifth Circuit in this case; and petitioners pray

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[7]The court must instruct a jury as to rules of law and protect parties from unjust verdicts. *Pleasants* v. *Fant*, 22 Wall. U. S. 116, 121 (excerpt in appendix); *Paramount Film Dist. Co.* v. *Applebaum*, (5 C. A.) 217 F. 2d 101.

[8]*Brooklyn Savings Bank* v. *O'Neal*, 324 U. S. 697, 65 S. Ct. 895, 906.

that this Honorable Court will reverse the judgment of the lower court in this case and remand the case to the United States Court of Appeals for the Fifth Circuit with directions to vacate its judgment in this case and to enter a judgment reversing the judgment of the lower court and entering a judgment for petitioners as appellants therein; or in the alternative that the case be reversed and remanded to the lower court for trial anew under proper directions of this Honorable Court.

Most respectfully submitted,

WILLIAM HAROLD COX,
1109-10 Deposit Guaranty Bank Building,
Jackson (1), Mississippi,
Attorney for Petitioners.

CERTIFICATE.

I certify as attorney of record for the petitioners in the above-styled and numbered cause in this court that I have this day mailed by air mail, postage pre-paid, to Peeler Williams, Jr., Esquire, 404 Liberty Building, Waco, Texas, and J. W. Crosland, Esquire, 1100 Republic National Bank Building, Dallas, Texas, attorneys of record for the respondent, at their said proper post-office addresses, a true copy of the foregoing Petition for Certiorari in this case.

This April 20, A. D., 1956.

WILLIAM HAROLD COX,
1109-10 Deposit Guaranty Bank Building,
Jackson (1), Mississippi,
Attorney for Petitioners.

APPENDIX

OPINION OF THE COURT FILED: FEBRUARY 23, 1956.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

No. 15650.

EDWARD E. MORGAN CO., INC., JONES & GILLIS, INCORPORATED and UNITED STATES FIDELITY AND GUARANTY COMPANY,
Appellants,

vs.

UNITED STATES OF AMERICA, FOR USE AND BENEFIT OF W. O. PELPHREY,
Appellee.

Appeal from the United States District Court for the Western District of Texas.

(February 23, 1956.)

Before TUTTLE, CAMERON and JONES, Circuit Judges.

JONES, Circuit Judge: The appellants, Edward E. Morgan Company, Inc., and Jones & Gillis, Incorporated, herein referred to as the prime contractors, entered into a contract with the United States of America for the construction of runway, taxiway and parking apron extensions at the Gray Air Force Base near Killeen, Texas. A construction bond was given by the prime contractors with the appellant, United States Fidelity and Guaranty Company, as surety. The contract was on a unit price basis.

A schedule of designations and unit prices was annexed to and made a part of the contract. In this schedule there was included as Item No. 4, Crushed Stone Base Course of an estimated quantity of 30,500 cubic yards at a price of $2.17 per cubic yard. Included as paragraph 7-14 of the specifications of the contract was the provision:

> "The unit of measurement for base course shall be the cubic yard, measured in place and computed by the average end-area method, for the quantity of completed and accepted base course as determined by the contracting officer."

Following the above we find this provision:

> "The quantities of base course, determined as specified in paragraph 7-14, will be paid for at the contract unit price for 'Crushed Stone Base Course,' which payment shall constitute full compensation for the construction and completion of the base course, including the preparation of the subgrade, the furnishing of all materials, supplies, equipment, and tools; the handling, manipulating, placing, shaping, compacting, rolling, finishing, and correcting unsatisfactory areas; the furnishing and applying of water; and the furnishing of all other labor and incidentals necessary to complete the work required by this section of the specifications."

The use plaintiff, W. O. Pelphrey, whom we will call the subcontractor, submitted a letter offer dated April 7, 1953, to the prime contractors in which he proposed:

> "* * * to furnish all equipment, tools, labor and incidentals necessary to excavate and crush a minimum of 40,000 C. Y. [cubic yards] of Edwards Limestone * * *. At your option, the material will be stockpiled or delivered to your handling units from our bins, provided the hauling units you choose can clear out bins without alteration thereto. * * * This work to be performed in accordance with specifications and to meet the screen analysis of the specifications. * * *

"For the above work we quote 1.01 per C. Y. Partial payment to be made by the 10th of each month. Final payment 15 days after completion of job."

By a letter dated April 13, 1953, from the prime contractors to the subcontractor, the offer was accepted. The pertinent portions of the acceptance are:

"We herewith accept your proposal of April 7, 1953, to crush the rock for the extension of the Gray Air Force Base Runway and Taxiways.

* * * * *

"You will also be governed by the same regulations, as to wages, etc., that we are under the terms of our contract."

Although not mentioned in either of the letters comprising the contract between the prime contractors and the subcontractor, some of the rock crushed by the subcontractor was used in the construction of a perimeter road for which the prime contractors were paid on a square yard basis. Some of the rock was used in construction of or at a fire station but there is no evidence showing how much was so used nor the manner of computing the prime contractors' compensation. The rock for the perimeter road was an extra under the prime contract and probably the same was true of that used at the fire station.

The prime contractors employed D. E. Goetes (sometimes in the record spelled "Goates" and as "Goetz") to haul the rock crushed by the subcontractor to the site of the work in dump trucks, each of which, the evidence showed, held five cubic yards. Goetes was paid for hauling 3,090 cubic yards to the perimeter road and fire station, and 44,890 cubic yards to the Gray Air Force Base Project. By dump truck measurement the subcontractor crushed and delivered 47,980 cubic yards of stone.

On June 26, 1953, the subcontractor submitted to the prime contractors an estimate for the period through June 25, 1953, based upon the crushing of 30,730 cubic yards of stone. On July 1, 1953, the prime contractors sent to the subcontractor an estimate showing 14,863 cubic yards of stone for runways and taxiways and 2,000 cubic yards of stone for the perimeter road, which estimate was only for the period ending June 15, 1953. This estimate was transmitted to the subcontractor by a letter from the prime contractors advising that the figures were taken from the estimate of the U. S. Engineers and were approximate only. The letter stated that the work for the period June 15th through the 25th would come through on the July 25th estimate. The records of Goetes show that he hauled 15,310 cubic yards through June 13, 1953. If to this we add the 1,655 cubic yards which the subcontractor's books show were delivered on June 15, 1953, we have 16,965 cubic yards, a figure not greatly in excess of the 16,863 cubic yards of the U. S. Engineers' approximate figures. With the letter was a check for $17,031.63 in payment for crushing 16,863 cubic yards of stone at $1.01 per cubic yard.

The work of the subcontractor was completed on July 11, 1953. On July 24, 1953, he billed the prime contractors with mining and crushing 47,980 cubic yards of stone at the contract price of $1.01, or $48,459.80, upon which he credited the payment of $17,031.63, leaving a balance, as shown by his invoice, of $31,428.17. The army engineers estimated that there were 31,187 cubic yards of crushed stone in the runways, taxiways and parking aprons, and 2,415 cubic yards of crushed stone in the perimeter road, or a total of 33,602 cubic yards, measured in place as required by the contract between the United States and the prime contractors. The prime contractors, using the "in place" measurement, determined the total amount payable under

the subcontract to be $33,938. Payment was tendered on this basis. Subsequently the prime contractors offered payment based on 40,000 cubic yards of crushed stone, the minimum quantity as specified in the letter agreement. The tender was refused. For the amount claimed by the subcontractor credit being given for the interim payment, action was brought under the Miller Act, 40 U. S. C. A., Section 270a *et seq.*

The subcontractor had a check of the prime contractors for $22,374.44 which bore a notation that it was in full settlement. He asked the prime contractors for authority to use the check without prejudice. The request was refused. The check was tendered into the registry of the court. During the trial and while the subcontractor was on the stand as a witness in his own behalf he endorsed the check so as to make it payable to the clerk.

Considerable evidence was introduced, including testimony that there was a custom or usage in Texas that crushed stone was bought and sold by loose truck measurement. Instructions were requested by the prime contractors that doubts as to the meaning of the term "C. Y." or "cubic yard" should be resolved against the subcontractor, and that the jury should find for the prime contractors unless the subcontractor proved that both parties intended that the subcontractor should be paid by loose truck measurement and not by U. S. Engineer estimates of rock in place as the prime contractors were paid. The prime contractors also asked for a peremptory instruction based upon the endorsement in court of the check which bore the "full settlement" notation. The requested instructions were refused. The court submitted to the jury a special issue as to whether it was the intent of the parties that the subcontractor should be paid for the rock crushed by him on the basis of "cubic yard truck measurement."

The jury gave an affirmative answer to the question and the court entered judgment for the subcontractor. Before us the prime contractors urged that the special issue should not have been submitted and that as submitted it was leading in form and without adequate instructions as to the burden of proof; that evidence of the usage or custom prevailing in Texas as methods of measuring crushed stone should not have been received; that there was an accord and satisfaction resulting from the endorsement of the check; and that the subcontract provided for the same basis for measurement and payment as the prime contract.

The district court did not err in submitting to the jury the question calling for a special verdict. This practice is authorized by Rule 49, Fed. Rules Civ. Proc. The court defined "preponderance of the evidence" and submitted the question "Do you find from a preponderance of the evidence, if any, that at the time the contract sued upon was entered into, it was the meaning and intent of the parties thereto that W. O. Pelphrey was to be paid for the limestone rock crushed by him on the basis of $1.01 per cubic yard truck measurement? Answer 'Yes' or 'No.'" The court then charged that the jury was the exclusive judge of the facts proven, of the credibility of witnesses and the weight to be given their testimony. The question propounded was brief, it called for a categorical answer. It posed a narrow question and a question of fact. There was not a mixed question of law and fact such as had our disapproval in *Jackson* v. *King*, 5th Cir. 1955, 223 F. 2d 714. The instructions to be given by the court as a guide to a jury in returning a special verdict will, as in the case of a general submission, vary with each situation of fact and law. The instructions given in this case were adequate. Neither the form of the question nor the accompanying instructions confused or misled the jury. See 5 Moore's Federal Practice, 2207 *et seq.*

The admission of evidence for the purpose of showing a usage or custom prevailing in Texas as to the selling of crushed rock by loose truck measurement is assigned as error. It is urged that the custom was not pleaded and therefore ought not have been the subject of proof. The contention is made that there was no showing that the prime contractors knew of the custom and hence were not to be bound by it. The prime contractors assert that the subcontractor's letter proposal was accepted by them in Mississippi with the result that there the contract was made so that if any custom applied, which is denied, it should be the custom or the absence thereof, prevailing in Mississippi rather than Texas usage or custom, and that the availability and effect of evidence of custom and usage should be determined by the rather strict law of Mississippi rather than the more liberal Texas rule. And it is further contended that because of the provision that the "work shall be done according to specifications and to meet the screen analysis of the specifications," there is an express incorporation into the subcontract of the prime contract provisions as to measurement of the crushed stone in place, and, it is urged, that because it is a subcontract with which we are concerned, the prime contract provisions rather than usage or custom will be the guide to interpretation in resolving ambiguities if any there be. The subcontractor, say the prime contractors, should be paid according to the formula, applicable to the prime contractors, of measurement in place as fixed in the agreement between them and the United States.

Edward E. Morgan Company, Inc., a Mississippi corporation, was one of the prime contractors. E. E. Morgan, as a witness in the case, was asked, "Your company was Edward E. Morgan Co., Inc., was it not?" He answered "Yes, sir." He was asked, "That's a personally owned company, is it not?" He answered "Yes, sir," and went

on to testify that Jones & Gillis, Incorporated, the other prime contractor, was a personally owned company, owned by R. H. Jones and M. D. Gillis. He testified that this was his first job where crushed stone was used, that he had no knowledge of any custom prevailing in Texas regarding the manner of measurement of crushed stone and made no inquiry as to any such custom. This evidence was introduced for the purpose of overcoming any inference that the prime contractors must have known of the custom. No showing was made as to the knowledge of the custom by Messrs. Jones and Gillis. The prime contractors had an office at Killeen, Texas, at the time of the subcontractor's proposal, and it was to this office for the attention of Mr. G. L. Thorn that the letter proposal of the subcontractor was directed. The acceptance, over the signature of Mr. Morgan, was sent from Jackson, Mississippi, and a copy of it went to Mr. Thorn at Killeen, Texas. In the acceptance the prime contractors directed the subcontractor "to contact our Mr. G. L. Thorn at Gray and work out the details for doing the work." It cannot be said that it has been made to appear that the prime contractors were without knowledge of the custom in Texas that crushed stone was sold and purchased by loose truck measurement. The witness, E. E. Morgan, testified only as to his own lack of knowledge, not with respect to his associates. Absent proof that there was no knowledge of a party to an agreement of a custom which might interpret its meaning, the existence of such knowledge will be imputed to the parties. *Smith* v. *Smith,* (Tex. Civ. App.) 234 S. W. 419.

Objections were interposed by the prime contractors to the evidence offered by the subcontractor regarding the custom of measuring rock and gravel sold from bins because it was not pleaded. The court overruled the objection and gave leave to amend. The amendment was filed. We see no error. Fed. Rules Civ. Proc. 15.

We think it is unnecessary to decide whether a federal district court sitting in Texas in a case where jurisdiction is not based on diversity of citizenship should resolve a conflict of laws question by the law of the forum, *i. e.*, Texas, or by a general rule or federal doctrine. Such a question was posed by the United States Supreme Court in *D'Oench, Duhme & Co.* v. *Federal Deposit Insurance Corporation*, 315 U. S. 447, 62 S. Ct. 676, 86 L. Ed. 956, and by this court in *Fahs, Collector*, v. *Martin, Trustee in Bankruptcy*, 5th Cir. 1955, 224 F. 2d 387. In neither case was the court required to decide the question, nor does such necessity exist here. By the Texas law a contract made in one state and to be performed wholly in another is to be governed by the law of the place of performance. *Cockburn* v. *O'Meara*, 5th Cir. 1944, 141 F. 2d 779, and cases therein cited. Such also is the rule announced by the Supreme Court of the United States. *Andrews* v. *Pond*, 13 Peters 65, 38 U. S. 65, 10 L. Ed. 61; *Miller* v. *Tiffany*, 1 Wall. 298, 68 U. S. 298, 17 L. Ed. 540; *Scudder* v. *Union National Bank*, 1 Otto 406, 91 U. S. 406, 23 L. Ed. 245; *Pritchard* v. *Norton*, 16 Otto 124, 106 U. S. 124, 1 S. Ct. 102, 27 L. Ed. 104; *Hall* v. *Cordell*, 142 U. S. 116, 12 S. Ct. 154, 35 L. Ed. 956. The rule is applied in admiralty, an exclusive federal sphere. *Louis-Dreyfus* v. *Paterson Steamships*, 2d Cir. 1930, 43 F. 2d 824. The law of the place of performance governs whether our problem be one of performance of the contract or payment of the amounts due under it. 11 Am. Jur. 423, *et seq.*; Conflict of Laws, Sections 131, 132. Hence we look to the law of Texas rather than to the law of Mississippi for our guide in determining the admissibility of evidence as to the usage or custom.

The well settled doctrine that custom or usage will not vary the terms of a written contract needs no citation in its support. But evidence of custom and usage may

supply the meanings of words or phrases and supply by implication necessary provisions with respect to which the written instrument is silent. The Texas law has been thus stated:

> "A valid usage or custom concerning the subject matter of a contract, knowledge of which may be imputed to the parties, is, according to a general rule, incorporated into the contract by implication. This means that where there is nothing in the agreement to exclude the inference, the parties are presumed to have contracted with reference to the usage, provided that it is just and reasonable, and evidence of the usage is admissible, not to vary or contradict the terms of the contract, but to aid in interpreting it and to ascertain with greater certainty what was intended. When an agreement is silent or obscure as to a particular subject, the law and usage become a portion of it and constitute a supplement to it and interpret it. * * *
>
> "It follows from what is said above that if the language of a contract is ambiguous, uncertain, incomplete or inconsistent, evidence of usage or custom is admissible to show the meaning intended by the parties." 42 Tex. Jur. 843-844, Usages and Customs, Secs. 14, 15.

The foregoing rule has been recognized by this court. *Eustis Packing Co.* v. *Martin*, 5th Cir. 1941, 122 F. 2d 648; *Black* v. *Interstate Commerce Commission*, 5th Cir. 1948, 167 F. 2d 825. Neither the letter proposal nor the letter acceptance specifically provides that the quantity of crushed stone should be determined by measurement in place by the United States Engineers, as contended by the prime contractors, or by loose truck measurement, as claimed by the subcontractor. The evidence of custom and usage is admissible to supply that which the writings omit.

The prime contractors, in asserting that the subcontractor provision, "This work to be performed in accordance

with specifications and to meet the screen analysis of the specifications," incorporates into the subcontract the prime contract provisions for measurement of the crushed rock, would give to the words a meaning that we cannot find in them. We regard the quoted language as relating to the manner of the performance of the work, not the manner of measuring the quantity of rock delivered by the subcontractor nor the basis for computing the amount to be paid to the subcontractor. If these matters are to be governed by the prime contract provisions it must be by reason of something other than a requirement for the manner of performance of the work. It is apparent that the undertakings of prime contractors to the United States with respect to the crushed rock is not at all the same as the obligation assumed by the subcontractor to the prime contractors. The prime contractors agreed to make runways, taxiways, an apron, and a roadway and in so doing to furnish crushed rock in place, packed and tamped, for which it was to be paid by measurements in place. The subcontractor agreed to deliver crushed rock "stockpiled or delivered to your handling units from our bins." The contract of the prime contractors called for the delivery of a finished product or something closely akin to it; the subcontractor was a supplier of raw material. In the prime contract it was estimated that 30,500 cubic yards of crushed rock in place would be needed on the job. It was shown that there was a shrinkage of approximately one-third between loose crushed rock, such as the subcontractor furnished, and the rock packed and measured in place under the prime contract provisions. It would, therefore, have required 45,750 cubic yards of loose crushed rock to meet the prime contract estimate. The minimum stipulated in the subcontract was, as has been noted, 40,000 cubic yards. 44,890 cubic yards, by loose truck measure was delivered to the air base job and the remainder of the rock

supplied by the subcontractor went to the perimeter road. The parties contemplated that more than 45,000 cubic yards of stone, loose truck measure, would be required, but that only 30,500 cubic yards, measured in place, would be required.

We cannot reach a conclusion other than that the parties intended that the subcontractor should furnish 40,000 cubic yards of crushed stone, measured by loose truck measurement, and as much more as might be required to provide the 30,500 cubic yards or more, measured in place, and that payment was to be made on the truck measure basis rather than being measured in place. Looking at the two letters comprising the subcontract, and at the provisions of the prime contract, examining the testimony as to the acts of the parties and as to the usage and custom in Texas of measuring loose crushed rock, we find the judgment to be a proper one. We do not find prejudicial error. The judgment is

AFFIRMED.

CAMERON, Circuit Judge, DISSENTING:

Reversible error was, in my opinion, committed by the Court below in more than one particular. Its error in receiving and attributing such determinant force to the evidence of custom is so obvious and prejudicial that I will discuss that error alone in this dissent.

The battle below was pitched on the question whether the number of cubic yards furnished appellants by appellee was to be determined according to the measurement-in-place method, upon which the Government paid appellants, or by loose-truck measurement, under which appellant paid the subcontractor who did the hauling of the crushed stone.

The Court below admitted, over appellants' objection, evidence of custom relating to this controversy which turned out to be the most important factor in answering this crucial question. The Court below erred, in my opinion, in admitting the evidence at all and in letting a jury verdict rest upon it.

Evidence of custom is valuable in determining the meaning of words provided it satisfies certain minimal requirements. These are thus stated in 55 Am. Jur., Usages and Customs, Sections 7 and 23-4, which text is cited with approval in the Texas case of *Whitfield* v. *Border Truck Lines, infra:*

> "* * * It is a well-established rule, in the absence of anything to show actual knowledge of a party of the existence of a usage or custom, or an actual assent to be bound thereby, that a usage or custom, in order to be binding, must be general in its operation, or at least so general and universal in character that knowledge of it essential to the binding effect upon the party to be charged may be presumed. [p. 269] * * *
>
> "* * * The rule is usually stated to be that it will be sufficient to show that a custom is so general as to justify the presumption that the person sought to be bound thereby had knowledge of the same. [p. 283]
>
> "* * * Usages of trade are not recognizable in law unless they have the essential elements of certainty, notoriety, and continuity, bringing themselves home to the knowledge of those who are concerned in the trade or business to which they pertain. In order to create even a *prima facie* presumption that a party has knowledge of a usage incident to a particular business about which he is engaged, the usage must be shown to be a general one in that business, of such sort as that it would be unreasonable to suppose he was ignorant of it. * * *" [p. 284]

And, in the same text, on page 287 [Sec. 27], it is noted that "* * * evidence as to usages and customs is received with caution * * *."

The limitations of those requirements are recognized in Texas and are well stated in the recent case of *Whitfield Transportation Co.* v. *Border Truck Lines*, Tex. Civ. App., 1954 (writ of error refused), 271 S. W. 2d 706, 708, which quotes from 5 Tex. Jur., pp. 1025-6, Sec. 15:

> "Before such liability can be enlarged by usage and custom it must appear [from] clear and satisfactory evidence that such usage and custom was well established and so notoriously or generally known that the contracting parties knew or were charged with knowledge thereof (55 Am. Jur., pp. 282-283, Secs. 21, 22) so that in the absence of any expression to the contrary it may be assumed that the parties understood that usage and custom was to be incorporated in their contract."

This seems to be the last word from Texas on the subject and is much more to the point than the old case of *Smith* v. *Smith*, referred to in the majority opinion. These minimal requirements should be interpolated into the quotation in the majority opinion from 42 Tex. Jur., pp. 843-4, so as to define the circumstances which control the clause in that quotation reading: "knowledge of which may be imputed to the parties."

The evidence here fails to measure up to those standards. Appellee himself did not take the stand to testify that there was such a general custom or to assert knowledge of such a custom or to impute knowledge to appellants. Appellant, Morgan, testified categorically that he had no knowledge of any such custom. Appellee did not offer any testimony tending to bring home knowledge of such a custom to appellants.

The three witnesses whom appellee introduced testified, in response to leading questions, that there was a general custom in effect in the State of Texas of such terms as to support appellee's contention. But they did not relate that custom to the place where this contract was entered into or to the place where it was to be performed. They did not give any testimony tending to show that the custom was notorious or that it was generally known in the trade in the area. There was no clear or satisfactory evidence from which the jury could have found that there was such a custom of such general notoriety that it would be unreasonable to assume that appellants did not have notice of it.

Nor was there any proof of uniformity. The proof tended to show the contrary. Two of the witnesses testified that, where the crushed stone was transported on railroad cars, the weight of the shipment and not the volume was taken as determining the number of cubic yards. It is clear, in my opinion, that the appellee failed to produce evidence which was clear and satisfactory on the point.

The evidence of custom was not received in obedience to procedural requirements. The trial was begun on March 7th. Appellee as plaintiff put on his proof, appellants as defendants put on their proof, and both sides rested; whereupon appellee brought in, as if in rebuttal, the three witnesses mentioned. The question of custom had not theretofore been adverted to in the testimony either of appellee or appellants. The right to introduce this evidence in rebuttal or at all was contested by appellants at every step. Appellee finally recognized that so important a provision in the contract should have been dealt with in the pleadings, and filed an amendment to the complaint; but that was not done until March 10th, the day after all of the

evidence was in and the record showed no order of Court permitting the amendment. Even under the liberal provisions of Rule 15, the evidence was not permissible.

Finally, the Court below erred in refusing to instruct the jury, as seasonably requested by appellants, with respect to the eleventh hour reliance placed by appellee upon custom to supply one of the important ingredients of his case. These requests asked that the jury be instructed that, if the evidence on the question of method, of measurement of each cubic yard was evenly balanced, that issue should be resolved in favor of defendants; that the ambiguity, if any, resulted from an instrument written by appellee and that any doubt resulting from the terms used should be resolved in favor of appellants unless appellee had established his version by the greater weight of the evidence. These requested instructions were all clear and proper statements of the law and should have been given. The error in refusing them was clearly prejudicial in view of the fact that the Court did not give the jury any instructions at all as to standards by which they should be guided in determining this question. The leading question put to the jury by the Court[1] did not mention appellants' theory of measurement. Following immediately after the inadequate but nevertheless emphasized evidence of appellee about custom, this placed appellants at a distinct and prejudicial disadvantage. It is my opinion that the judgment of the Court below should be reversed.

A True Copy:

Teste: John A. Feehan, Jr.,
Clerk of the United States Court of Appeals for the Fifth Circuit.
By Clara R. James,
(Seal) Deputy.

---

[1]"Do you find from a preponderance of the evidence, if any, that at the time the contract sued upon was entered into, it was the meaning and intent of the parties thereto that W. O. Pelphrey was to be paid for the limestone rock crushed by him on the basis of $1.01 per cubic yard truck measurement?"

JUDGMENT.

Extract from the Minutes of February 23, 1956.

No. 15650.

EDWARD E. MORGAN CO., INC., JONES & GILLIS, INCORPORATED, and UNITED STATES FIDELITY AND GUARANTY COMPANY,

vs.

UNITED STATES OF AMERICA, FOR USE AND BENEFIT OF W. O. PELPHREY.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Edward E. Morgan Co., Inc., Jones & Gillis, Incorporated, and United States Fidelity and Guaranty Company, and the surety on the appeal bond herein, Standard Accident Insurance Company of Detroit, Michigan, be condemned, *in solido*, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Cameron, Circuit Judge, dissenting."

* * * * *

ORIGINAL FILED: MARCH 29, 1956.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

No. 15650.

EDWARD E. MORGAN CO., INC., JONES & GILLIS, INCORPORATED, and UNITED STATES FIDELITY AND GUARANTY COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA, FOR USE AND BENEFIT OF THE O. PELPHREY,
Appellee.

ON CONSIDERATION OF THE APPLICATION of the Appellants in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable them to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

DONE AT NEW ORLEANS, LA., this 28th day of March, 1956.

(S) Warren L. Jones,
United States Circuit Judge.

In *Pleasants* v. *Fant*, 22 Wall. (U. S.) 116, 121, this court said:

> "It is the duty of a court in its relation to the jury to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them in the issues they are to try, by admitting only such evidence as is proper on these issues and rejecting all else; by instructing them in the rules of law by which that evidence is to be examined and applied, and finally, when necessary, by setting aside a verdict which is unsupported by evidence or contrary to law."

MAY 19 195
HAROLD B. WILLEY,

No. 894

In the

Supreme Court of the United States

OCTOBER TERM 1955

EDWARD E. MORGAN CO., INC., JONES & GILLIS, INCORPORATED, UNITED STATES FIDELITY AND GUARANTY CO., and STANDARD ACCIDENT INSURANCE COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA, for the use of W. O. PELPHREY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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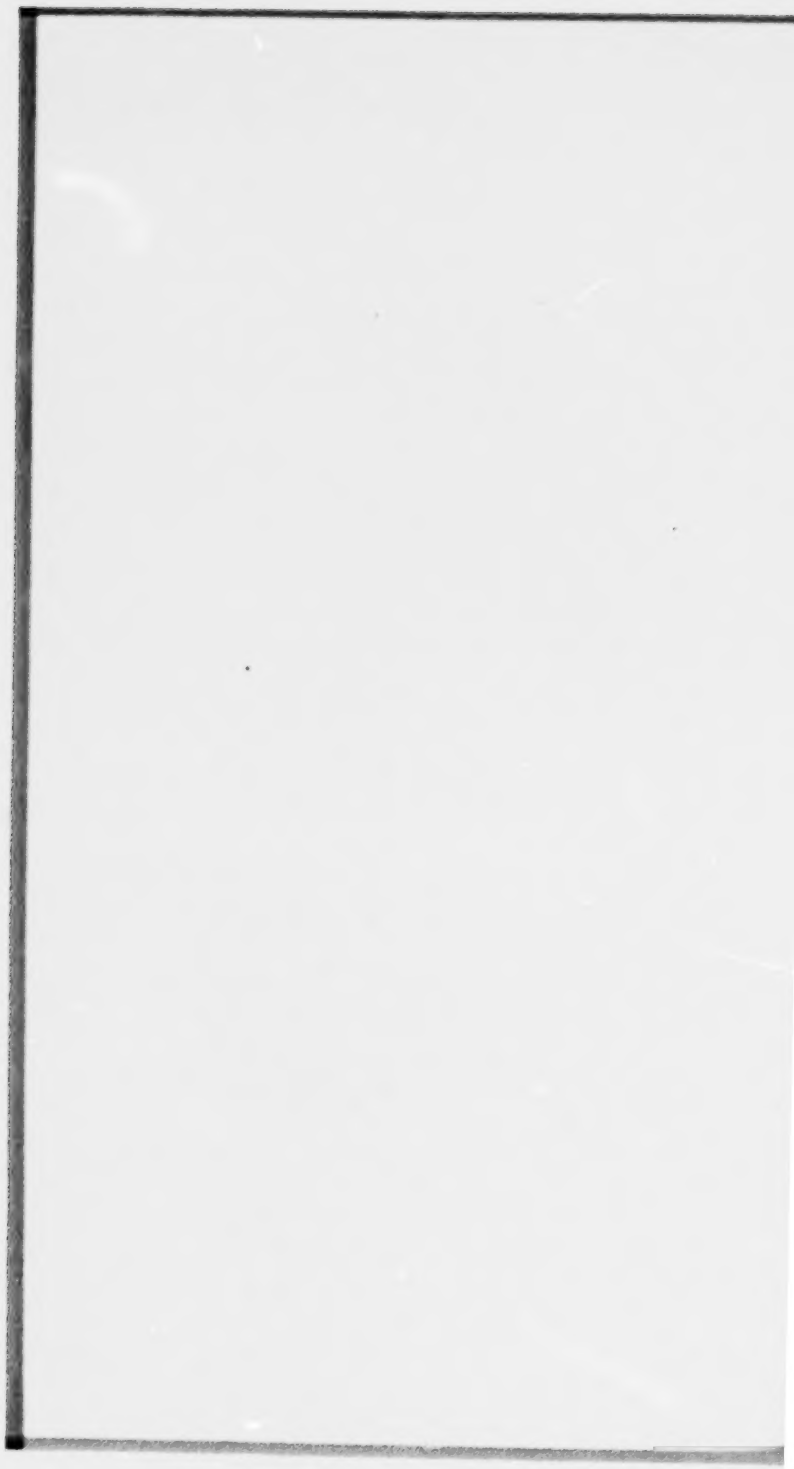

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No. 894

In the

Supreme Court of the United States

OCTOBER TERM 1955

EDWARD E. MORGAN CO., INC., JONES & GILLIS, INCORPORATED, UNITED STATES FIDELITY AND GUARANTY CO., and STANDARD ACCIDENT INSURANCE COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA, for the use of W. O. PELPHREY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court is unreported. The opinion and dissenting opinion of the court of appeals is at the present time also unreported, but a copy thereof appears in the appendix to the petition for certiorari at pages A1-A16.

JURISDICTION

The judgment of the court of appeals affirming the judgment of the district court (R. 234-236) in favor of Respondent was rendered on February 23, 1956 (R. 263). Appellants' petition for rehearing, timely filed, was denied on March 23, 1956 (R. 284). The petition for a writ of certiorari was filed April 23, 1956. Petitioners have sought to invoke the jurisdiction of this court under *28 U. S. C. A. Section 1254(1).*

QUESTIONS PRESENTED

The questions are:

1. (a) Was there sufficient evidence presented for the trial court to submit the following special issue to the jury:

> "Do you find from a preponderance of the evidence, if any, that at the time the contract sued upon was entered into, it was the meaning and intent of the parties thereto that W. O. Pelphrey was to be paid for the limestone rock crushed by him on the basis of $1.01 per cubic yard truck measurement?"

or should the trial court have granted the Petitioners' request for a peremptory instruction or directed verdict?

(b) Did the trial court err in refusing to give Petitioners a peremptory instruction or directed verdict based upon the fact that during the trial of the case and at the direction of the clerk of the court the Respondent endorsed Petitioners' check by making same payable to the Clerk of the District Court, who later caused same to be cashed

and deposited into his official funds as funds paid and held in the registry of the court, said check having theretofore been issued to Respondent by Petitioners with notations thereon to the effect that the check was in full settlement of all work done by Respondent pursuant to his contract with Petitioners?

2. Were the instructions which the trial court gave the jury proper and sufficient to enable the jury to understandingly discharge its duty, or was it necessary for the trial court to give the jury the additional instructions requested by Petitioners in order for the jury to understandingly discharge its duty?

3. Did the court err in admitting testimony on the usage and custom prevailing in Texas, the state where the contract was performed, to the effect that when crushed rock is bought and sold at the bins it is measured by the cubic yard content of the trucks hauling the rock?

4. Are the Petitioners entitled to have this court pass upon a question which has not been previously raised in or passed upon by either of the lower courts but for the first time has been presented as a part of the petition for certiorari filed by Petitioners, the question being: Does the judgment for the Respondent entered by the trial court for $30,325.33 together with interest thereon at the rate of six per cent (6%) per annum from the 24th day of July, 1953, to the date of this judgment, for an aggregate amount of $33,346.74, and with further interest at the rate of six per cent (6%) per annum as provided by law from the date of entry of this judgment until paid,

* * *" contravene the Federal Statute *(28 U. S. C. A., Section 1961)*?

STATUTES AND REGULATIONS INVOLVED

There are no constitutional provisions, treaties, statutes, ordinances or regulations involved in this case, other than *28 U. S. C. A., Section 1961*, set forth in the Appendix hereto.

STATEMENT

The pertinent facts are set forth in the opinion of the Court of Appeals appearing at pages A1 to A8 inclusive of the appendix to the petition for certiorari and are also set out below as follows:

Two of the petitioners (referred to in this statement as "Prime Contractors") had the prime contract with the United States of America for the construction of runway, taxiway and parking apron extensions on the Gray Air Force Base at Killeen, Texas (Pl. Ex. 10; R. 30-66, 121). United States Fidelity and Guaranty Company is surety on the construction bond furnished the United States by the Prime Contractors (R. 3, 7). Standard Accident Insurance Company is the surety on the supersedeas bond made by the other three petitioners. Respondent became a subcontractor of Prime Contractors by virtue of two letters, one being a letter dated April 7, 1953 written by Respondent addressed to Prime Contractors at Killeen, Texas (Pl. Ex. 1; R. 14-15, 108) wherein it was stated:

> "We propose to furnish all equipment, tools, labor, and incidentals necessary to excavate and crush a minimum of 40,000 C. Y. of Edwards Limestone * * *.

At your option, the material will be stockpiled or delivered to your handling units from our bins, provided the hauling units you choose can clear our bins without alteration there to. * * *. This work to be performed in accordance with specifications and to meet the screen analysis of the specifications. * * *.

"For the above work we quote 1.01 per C. Y. Partial payment to be made by the 10th of each month. Final payment 15 days after completion of job."

The other was a letter of acceptance from Prime Contractors, dated April 13, 1953, addressed to Respondent (Pl. Ex. 2; R. 15-16, 108), the pertinent parts of which are:

"We herewith accept your proposal of April 7, 1953 to crush the rock for the extension of Gray Air Force Base Runway and Taxiway.

* * * * *

"You will also be governed by the same regulations, as to wages, etc., that we are under the terms of our contract."

Prime Contractors were paid by the United States for the crushed stone base course constructed by them on the basis of measuring the material after same had been compacted in place (Pl. Ex. 10; R. 82-83, 121). After Respondent had fully completed his contract Prime Contractors then, and not until then, made the contention that they were to pay Respondent on the same basis on which they were paid by the United States and to support said contention insisted that the specifications of the prime contract became a part of the subcontract for the purpose of measurement and computing payment. Outside of mining and crushing the rock Respondent had absolutely nothing whatsoever to do with same nor did he have any control

over it after it left his bins (R. 175) and actually some of the rock crushed by Respondent was used in the construction of a perimeter road for which the Prime Contractors were paid on the basis of square yard measurement (R. 158-159), and still more of the rock was used in the construction of or at a fire station (R. 167-168).

The evidence is undisputed that Respondent, by truck measurement, crushed for and delivered to Prime Contractors 47,980 cubic yards of rock (R. 114) and Prime Contractors paid another subcontractor of theirs for hauling this 47,980 cubic yards of crushed stone (Pl. Exs. 13-A through 13-H; R. 67-71, 137). Both Prime Contractors and Respondent kept daily records of the number of cubic yards by truck measurement which were crushed and delivered (R. 140-142).

On June 26, 1953 Respondent submitted to the Prime Contractors an estimate for the period through June 25, 1953, based upon the crushing of 30,730 cubic yards of stone (Pl. Ex. 3; R. 16, 111). On July 1, 1953 Prime Contractors sent Respondent an estimate showing 14,863 cubic yards of stone used in the runways and taxiways and 2,000 cubic yards used in the perimeter road, which estimate was only for the period ending June 15, 1953 (Pl. Ex. 4-A; R. 18, 112). This estimate was transmitted by a letter from the Prime Contractors advising Respondent that the figures were taken from the estimate of the United States Engineers and were approximate only. The letter further stated that the work for the period June 1st through the 25th would come through on the July 25th

statement (Pl. Ex. 4; R. 17, 112). The amount of stone shown on the Prime Contractors' estimate furnished Respondent was only 97 cubic yards less than Respondent's records showed had been delivered through June 15th. (Pl. Ex. 12; Supp. R. 2-3, R. 110). Upon completion of his work Respondent billed the Prime Contractors with mining and crushing 47,980 cubic yards of stone at the contract price of $1.01, or $48,459.80, upon which he credited the July 1st payment of $17,031.63, leaving a balance as shown by his invoice of $31,428.17 (Pl. Ex. 5; R. 20, 114).The Prime Contractors using the "in place" measurement determined the total amount payable under the subcontract to be $33,938.00, from which was deducted the previous $17,031.63 payment, as well as certain other small charges (Pl. Ex. 6; R. 20-21, 115) and tendered payment on this basis, same being refused (R. 116). Subsequently, Prime Contractors, by letter dated August 21, 1953 (Pl. Ex. 7; R. 23-24, 117), offered payment based on the 40,000 cubic yard minimum quantity specified in the letter agreement and enclosed their check payable to Respondent in the sum of $22,374.44 with the notation thereon to the effect that the check was in full settlement for all work done by Respondent on the Gray Air Force Base Texas Job (Pl. Ex. 9-A; R. 28-29, 119). Respondent refused such tender and later brought suit under the Miller Act *(40 U. S. C. A. Section 270a, et seq.)* for $31,428.17, being the amount claimed by him (R. 1-5). In the complaint filed by Respondent the check of Prime Contractors for $22,374.44 was informally tendered into the registry of the court (R. 5). Respondent requested permission of the Prime Contractors

for authority to use the check without prejudice, but said request was refused (R. 120). During the trial of the case and while Respondent was on the stand as a witness in his own behalf and at the direction of the clerk, Respondent endorsed the check so as to make it payable to the clerk who subsequently deposited same into his official funds as funds paid and held in the registry of the court (A. 120, 210), where same still remain (R. 218).

During the trial the Prime Contractors interposed objections to evidence offered by Respondent regarding the custom of measuring by truck measurement, rock and gravel sold from bins because this custom was not pleaded. The court overruled the objection and gave Respondent leave to amend (R. 187), which amendment was duly filed (R. 6). Thereafter, considerable evidence was introduced to the effect that there was a general custom or usage existing throughout Texas that crushed stone at the bins was bought and sold by loose truck measurement (R. 188, 189, 191, 193, 200).

The Prime Contractors requested the court to give the jury several special instructions (R. 211-213). The Prime Contractors also asked for a peremptory instruction based upon the endorsement in court of the check which bore the "full settlement" notation (R. 213). The requested instructions were refused (R. 213) and the court defined "preponderance of the evidence and submitted the question on one special issue, to-wit:

> "Do you find from a preponderance of the evidence, if any, that at the time the contract sued upon was

> entered into, it was the meaning and intent of the parties thereto that W. O. Pelphrey was to be paid for the limestone rock crushed by him on the basis of $1.01 per cubic yard truck measurement?"

and then charged the jury that "You are the exclusive judges of the facts proven, of the credibility of witnesses, and the weight to be given their testimony, * * *." (R. 215).

The jury gave an affirmative answer to the question (R. 215) and the court entered judgment for the Respondent (R. 217-218).

The Court of Appeals affirmed the district court's judgment in favor of the Respondent (R. 263).

ARGUMENT

This case presents no question calling for review by this court. In rejecting each of petitioners' contentions the court below correctly applied established principles and there is no conflict of decision, nor is there any question of public or general importance involved in this case.

(1)(a) The letter proposal of April 7, 1953 (Pl. Ex. 1; R. 14-15, 108) and the letter of acceptance dated April 13, 1953 (Pl. Ex. 2; R. 15-16, 108) constitute the contract between the parties. The Prime Contractors contend that the words "This work to be performed in accordance with the specifications and to meet the screen analysis of the specifications" contained in the letter proposal have the effect of including the provisions of the specifications relating to the method of measurement upon which the Prime Contractors were paid for the crushed rock in place by

the United States into the letter proposal for the purpose of determining the method of measurement upon which Respondent was to be paid for the crushed rock furnished by him (R. 146). Such contention is wholly without merit. The above quoted reference to the specifications in the letter proposal in effect states only two things, one being that the work to be performed by Respondent (the work being the operation of the quarry) would be done in accordance with the provisions of the specifications and the other being that the crushed rock material would meet the screen analysis of the specifications. Each and all of the other provisions of the specifications relating to "CRUSHED STONE BASE COURSE" (Pl. Ex. 14; R. 71-83, 161) was the responsibility of the Prime Contractors (R. 172-176) even to the quality of the stone in the quarry which was to be crushed (R. 176).

The evidence is clear and convincing that it was the intention of the parties at the time the contract between them was entered into that Respondent was to be paid for the stone crushed by him on the basis of truck measurement. The letter proposal (Pl. Ex. 1; R. 14-15, 108) specifically states "* * *, the material will be stockpiled or delivered to your handling units from our bins, provided the hauling units you choose can clear our bins without alteration there to." Couple this language with the fact that a general usage and custom exists in Texas that the basis of measuring crushed rock sold at the bins is by loose truck measurement (R. 186-201), the contract admits of no interpretation but that the rock crushed by Respond-

ent was to be measured and paid for on the basis of the cubic yard content of the truck or hauling unit in which the material was hauled.

The actions of the parties clearly indicate that at the time the contract was entered into the parties intended that the rock furnished and purchased was to be measured on the basis of truck measurement. This is shown by the following:

(1) Petitioners used trucks for hauling the crushed rock;

(2) Both parties kept a daily record of the number of truck loads of rock that were delivered by Respondent to Petitioners' hauling units (Pl. Ex. 12; Supp. R. 2-3, R. 110 and R. 140-142);

(3) The only partial payment being for 16,863 cubic yards of rock furnished through June 15th, made by Petitioners during the progress of the work (Pl. Exs. 4 and 4-A; R. 17-18, 104) came within 97 cubic yards of constituting payment in full for the 16,960 cubic yards of rock measured by truck measurement actually furnished through the same date according to the records of Respondent (Pl. Ex. 12; Supp. R. 3, R. 110). This shows that at that time Prime Contractors were not paying on the basis of "in place" measurement, but to the contrary they actually paid on the basis of truck measurement;

(4) Petitioners at no time furnished Respondent with any engineer's estimates (R. 157) although they

now say that Respondent is to be paid according to the engineer's estimates;

(5) After the crushed rock left Respondent's bins he had nothing whatsoever to do with it and same became the sole responsibility of Prime Contractors to do with as they pleased (R. 175); and

(6) Petitioners not only used the crushed rock in the construction of the Gray Air Force Base Runways and Taxiways but also used some of it in a fire station and in a perimeter road (R. 167, 168).

From the foregoing, it is inescapable that the evidence is more than adequate to sustain the verdict. The law is well settled that the Supreme Court will not weigh conflicting testimony, but will only determine whether there is evidence adequate to sustain the verdict.[1]

It is obvious that the foregoing question contains nothing to merit the consideration of this court on petition for writ of certiorari as provided in Rule 19 of this court.

(b) The circumstances under which the check with the "full settlement" notation thereon was made payable, by endorsement, to the clerk of the United States District Court, Western Division, during the trial of the case and by him deposited into his official funds as funds paid and

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[1]Troxell v. Delaware Lackawanna & Western Railroad Company, 227 U. S. 434, 57 L. Ed. 586, 33 S. Ct. 274.

National Labor Relations Board v. Pittsburgh Steamship Company, 340 U. S. 498, 95 L. Ed. 479, 71 S. Ct. 453.

United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 84 L. Ed. 1129, 60 S. Ct. 1091.

Crumpton v. United States, 138 U. S. 361, 34 L. Ed. 958, 11 S. Ct. 355.

held in the registry of the court (R. 210), where they still remain (R. 218) could in no manner constitute an accord and satisfaction. There was no acceptance of the check by the Respondent. To the contrary through his pleadings, he made a tender of the check into the registry of the court (R. 5) and made a formal tender during the trial (R. 210). None of the proceeds of the check were received by Respondent nor did they inure to his benefit. The cases are legion to the effect that to have an accord and satisfaction there must be an acceptance by the party against whom the accord and satisfaction is urged. The cases cited by Petitioners (Pet. 11) on this point are to the same effect.

The decision of the lower court on this point in no way conflicts with any other court of appeals' decision nor does it conflict with applicable state or territorial law nor does this point involve any federal question or law.

(2) Petitioners have contended that the instructions of the trial court furnished no safe and dependable guide to the jury (Pet. 11). They further contended that the trial court erroneously submitted a mixed question of law and fact in its charge to the jury (Pet. 11). In support of their contention Petitioners cited the case of *Kirby H. Jackson, et al. v. C. E. King (5 C. A.), 223 Fed. 2d 714, 718* (Pet. 11). In disposing of these contentions the Court of Appeals had this to say:

> "The district court did not err in submitting to the jury the question calling for a special verdict. This practice is authorized by Rule 49, Fed. Rules Civ. Proc. The court defined 'preponderance of the

evidence' and submitted the question 'Do you find from a preponderance of the evidence, if any, that at the time the contract sued upon was entered into, it was the meaning and intent of the parties thereto that W. O. Pelphrey was to be paid for the limestone rock crushed by him on the basis of $1.01 per cubic yard truck measurement? Answer "Yes" or "No."' The court then charged that the jury was the exclusive judge of the facts proven, of the credibility of witnesses and the weight to be given their testimony. The question propounded was brief, it called for a categorical answer. It posed a narrow question and a question of fact. There was not a mixed question of law and fact such as had our disapproval in *Jackson v. King, 5th Cir. 1955, 223 F. 2d 714.* The instructions to be given by the court as a guide to a jury in returning a special verdict will, as in the case of a general submission, vary with each situation of fact and law. The instructions given in this case were adequate. Neither the form of the question nor the accompanying instructions confused or misled the jury." (Pet. A6.)

It is obvious that the foregoing question contains nothing to merit the consideration of this court on petition for writ of certiorari as provided in Rule 19 of this court.

(3) During the course of the trial leave was granted Respondent to file a trial amendment pleading custom and usage (R. 187) and to introduce evidence on the general usage and custom prevailing in Texas of buying and selling crushed rock at the bins on the basis of truck measurement. Petitioners urge that the admission of such testimony was error. The Court of Appeals, however, in affirming the trial court's judgment, had this to say:

"The well settled doctrine that custom or usage will not vary the terms of a written contract needs no

citation in its support. But the evidence of custom and usage may supply the meanings of words or phrases and supply by implication necessary provisions with respect to which the written instrument is silent. The Texas law has been thus stated:

> "'A valid usage or custom concerning the subject matter of a contract, knowledge of which may be imputed to the parties, is, according to a general rule, incorporated into the contract by implication. This means that where there is nothing in the agreement to exclude the inference, the parties are presumed to have contracted with reference to the usage, provided that it is just and reasonable, and evidence of the usage is admissible, not to vary or contradict the terms of the contract, but to aid in interpreting it and to ascertain with greater certainty what was intended. When an agreement is silent or obscure as to a particular subject, the law and usage become a portion of it and constitute a supplement to it and interpret it * * *.
>
> "'It follows from what is said above that if the language of a contract is ambiguous, uncertain, incomplete or inconsistent, evidence of usage or custom is admissible to show the meaning intended by the parties.' 42 Tex. Jur. 843-844, Usages and Customs, Secs. 14, 15.

"The foregoing rule has been recognized by this Court. *Eustis Packing Co. v. Martin, 5th Cir. 1941, 122 F. 2d 648; Black v. Interstate Commerce Commission, 5th Cir. 1948, 167 F. 2d 825.* Neither the letter proposal nor the letter acceptance specifically provides that the quantity of crushed stone should be determined by measurement in place by the United States Engineers, as contended by the Prime Contractors, or by loose truck measurement, as claimed by the subcontractor. The evidence of custom and usage is admissible to supply that which the writings omit." (Pet. A8-A10.)

The holding in the court of appeals on this question in no way conflicts with any other court of appeals' decision nor does it conflict with applicable state or territorial law nor does this point involve any federal question or law.

(4) A question now being presented for the first time by the Petitioners is whether or not the judgment entered for Respondent for "$30,325.33 together with interest thereon at the rate of six per cent (6%) per annum from the 24th day of July, 1953 to the date of this judgment, for an aggregate amount of $33,346.74, * * *" contravenes the Federal Statute *(28 U. S. C. A. Sec. 1961)* (Pet. 6, 13). This point was not included as a part of Petitioners' motion for new trial in the District Court (R. 219). It was not asserted as one of Petitioners' assignments of error to the Court of Appeals (R. 227) nor was it mentioned in Petitioners' petition for rehearing in the Court of Appeals (R. 264-266). Consequently, neither the trial court nor the Court of Appeals has had an opportunity to pass on this question. This court has repeatedly held that it will not decide questions which have not been passed upon by the Court of Appeals.[2]

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[2]Sozinsky v. United States of America, 300 U. S. 506, 81 L. Ed. 772, 57 S. Ct. 554.

Owens v. Union Pacific Railroad Company, 319 U. S. 715, 87 L. Ed. 1683, 63 S. Ct. 1271, certiorari denied, 323 U. S. 740, 89 L. Ed. 593, 65 S. Ct. 57.

Saltonstall v. Birtwell, 164 U. S. 54, 41 L. Ed. 348, 17 S. Ct. 19.

Lynch v. United States, 292 U. S. 571, 78 L. Ed. 1434, 54 S. Ct. 840.

Minnich v. Gardner, 292 U. S. 48, 78 L. Ed. 1115, 54 S. Ct. 567.

Even if Petitioners were entitled to be heard on this question, as a matter of fact, the federal statute relied upon by Petitioners; *28 U. S. C. A. Sec. 1961*, is not applicable to this case. The law where the contract was performed applies and not the Federal law.[3]

Assuming for the sake of argument, however, that the federal statute, *28 U. S. C. A. Sec. 1961*, does apply, the judgment in no way contravenes the statute. The statute provides that interest may be allowed on any money judgment in a civil case recovered in a district court. The judgment entered was for an aggregate of $33,346.74, being $30,325.33 plus 6% interest thereon from July 24, 1953 to date of judgment. Therefore, such judgment constitutes a money judgment in the total amount of $33,346.74. Interest was then allowed thereon from March 24, 1955, the date of the judgment herein. The fact that the total amount of the money judgment included interest on the unpaid balance of the contract price to the date of judgment does not mean that such judgment violates *28 U. S. C. A. Section 1961.* Respondent repeats, however, that this question is entirely moot since same was not passed upon by the lower court.

It is obvious that the foregoing question contains nothing to merit the consideration of this court on petition for writ of certiorari as provided in Rule 19 of this court.

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[3]United States for use and benefit of Lichter v. Henke Construction Co. (8th Cir.), 157 Fed. 2d 13.
Continental Casualty Company v. Clarence L. Boyd Company (10th Cir.), 140 Fed. 2d 115.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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ROBERT F. RITCHIE,
1100 Republic National Bank Building,
Dallas, Texas,
Attorney for Respondent, United States of America for the use of W. O. Pelphrey.

ROBERT F. RITCHIE,
Of Counsel.

CERTIFICATE

I certify as attorney of record for the Respondent in the above styled and numbered cause in this court that I have this day mailed by air mail, postage prepaid, to William Harold Cox, Esquire, 1109-10 Deposit Guaranty Bank Building, Jackson 1, Mississippi, attorney of record for the petitioners, at his said proper post office address, a true copy of the foregoing brief for the Respondent in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

This May ....., A. D., 1956.

.....

ROBERT F. RITCHIE,
1100 Republic National Bank Building,
Dallas, Texas,
Attorney for Respondent,

APPENDIX

28 U. S. C. A.:

Section 1961. Interest.

Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law. June 25, 1948, c. 646, 62 Stat. 957.